

NO. 20193

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.,

Appellant - Defendant and Third Party Plaintiff,

vs.

BERNARD A. NORIEGA,

Appellee - Plaintiff,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Appellant - Third Party Defendant.

BRIEF OF APPELLEE
BERNARD A. NORIEGA

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

NEWTON R. BROWN and
MARGOLIS & McTERNAN
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FILED

OCT 11 1965

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
Statement Of The Case	1
ARGUMENT	9
I. THE FINDINGS THAT THE FLANGE PROTRUDED INTO THE WORKING AREA AND CAUSED UNSEAWORTHINESS WERE AMPLY SUPPORTED BY THE EVIDENCE.	9
II. THERE IS NO ISSUE OF "INSTANT UNSEAWORTHINESS" AT BAR; THE DANGEROUS LOCATION OF THE UNNECESSARY FLANGE AND THE CONTINUING HAZARD ARISING FROM SUCH LOCATION AND FROM THE METHOD OF LOADING EMPLOYED, CREATED PLAIN AND CLEAR ANTECEDENT AND CONTINUING UNSEAWORTHINESS.	16
CONCLUSION	20
CERTIFICATE	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Ballwanz v. Isthmian Lines, Inc. (C. A. 4, 1963), 319 F. 2d 457	19
Blassingill v. Waterman SS Corp. (C. A. 9, 1964), 336 F. 2d 367	17, 18, 19
Crumady v. Joachim Hendrik Fisser, 358 U. S. 423	17, 18
Guzman v. Pichirillo, 369 U. S. 698	13
Knox v. United States Lines Co. (C. A. 3, 1961), 294 F. 2d 354	19
Morales v. City of Galveston, 370 U. S. 165	19
Robillard v. A. L. Burbank Co., (U. S. D. C. S. D. N. Y., 1960), 186 F. Supp. 193	19
Strika v. Netherlands Ministry of Traffic, (C. A. 2, 1950), 185 F. 2d 555	19
United States v. United States Gypsum Co., 333 U. S. 364	13
<u>Rules</u>	
Federal Rules of Civil Procedure:	
Rule 52 (a)	13
<u>Texts</u>	
3 Am. Jur. 462-463	13
53 Am. Jur. 795, 798	13

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Statement Of The Case

Appellee BERNARD A. NORIEGA (plaintiff below) was a longshoreman working aboard Appellant's (COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.) vessel the SS "SAN LUCIANO" on April 18, 1963 and suffered personal injuries when a portion of a steel flange fell upon his head from a coaming above him.

On the day of the accident Appellee was a member of an eight-man crew working in the No. 3 starboard hatch in the

inshore deep tank. The deep tank was the lowest deck or hold space of the vessel, being at the ship's bottom, below the tween decks. The tween decks hatch opening to the inshore deep tank was only 12 feet long by 8 feet wide and the width was reduced as to effective working area by a 3 foot shaft alley which any load must clear. Hence the clear hatch area at the time of the accident was only about 5 feet by 12 feet. (Tr. pp. 48-50; 22-23.)

On the day of the accident, April 18, 1963, the men in the deep tank were loading said hold area with bricks being brought in by pallet boards. The pallet boards were 3 feet by 6 feet. To lower the pallet boards through the tween decks hatch into the deep tank in such manner as to avoid the shaft alley required the winch driver to drag at the critical point on one line of the rigging (the yard fall). This pulled the load inshore, avoiding the shaft alley. Otherwise the load would land on top of the shaft alley and not descend into the deep tank.^{1/}

^{1/} "A. There was a shaft protruding and a shelf around, even with the coaming in the lower hold, and the winch driver would come down as far -- pretty close to the shaft alley and then swing on the yard line and miss the shaft alley.

"Q. So that in order for the pallet to set down on the little four wheeler which was down in there ---

"A. Yes.

"Q. -- a strain would be taken on the yard line to swing it over under the coaming?

"A. Not under the coaming.

"Q. All right. Where would it swing?

(Continued)

The consequence of thus pulling over the load by the yard fall to escape the shaft alley was to cause the rigging to drag and strike against the coaming of the tween decks hatch. Fastened to the side of the coaming at this point were two flanges which formerly had been used to support a strongback. When the rigging was pulled to avoid the shaft alley the rigging and gear (including particularly the blacksmith and the eyes of the wire slings to the pallet board) would drag over and strike against the flanges on the coaming. 2/

1/ (Con'd): "A. It would swing just a little bit to miss the shaft alley."

---Testimony of Appellee, Tr. p. 24.

"A. Well, you cannot bring the load to the lower hold at no time on the midship, because you have a three foot shaft alley in the lower hold standing at -- the height of it is about six feet, and after you leave this shelf deck going down you definitely have to slack it over to the yard fall.

"Q. That is because of --

"A. In order to get the load into the lower hold. Otherwise you'll be landing on the shaft alley."

---Witness Hansen, Tr. p. 68.

2/ "A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were ?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley

(Continued)

The flanges were fastened against the side of the coaming and protruded into the hatch area by their own width or thickness. As counsel for Appellant stated to the trial court, speaking of the findings as to the flange which ultimately fell,

" . . . it was flush against the coaming but extending into the working area approximately three-sixteenths of an inch." (Tr. p. 101.)

Moreover, the bottom portion of the flanges protruded even further because attached to bolts which protruded an additional "half to three-quarters of an inch." (Tr. p. 60.)

So severely did the rigging gear and wires holding the

2/ (Cont'd): which comes out three feet."

---Witness Hansen, Tr. pp. 57-58.

"A. Well, if this thing would go straight down it would hit the shaft alley, you see, so when he come down that far he would take a strain on the yard fall.

"Q. (By Mr. Larson) And that would just swing it over?

"A. That's right.

"Q. And when the strain was taken on the yard fall, would it rub against the edges of the coaming on the tween decks hatch?

"A. Yes.

"Q. Had you noticed before the time that this flange hit you, had you noticed there had been at least three instances in which the yard fall had hung up on this flange?

"A. Yes."

---Testimony of Appellee, Tr. p. 27.

descending pallet loads drag over and strike against the flange concerned in the accident that the upper lip thereof began to open up and pull away from the coaming, and the yard fall on three occasions "hung up on this flange", stopping the loads in mid-air and causing some bricks to fall. (Tr. p. 27.)

After the third load had "hung up" in this manner, the hatch boss stopped the loading and three crew members came with a sledge hammer and pounded the upper lip of the flange "flush" against the coaming again. (Tr. pp. 59-60.) 3/

3/ "Q. What did they do ?

"A. Well, one of them used a sledge and two of them stood by, and they took turns hitting it.

"Q. They pounded this flange back level or flush with the coaming, did they ?

"A. Yes. "

---Testimony of Appellee, Tr. p. 33.

"A. Yes, it hung up two or three times, I think about three times before we stopped work.

"Q. (By Mr. Larson) Did you see where the load was hanging up, what on the load was hanging up?

"A. Yes, the wire sling, the eye to the sling.

"Q. Did you see what it was catching on ?

"A. Yes. It was catching on this flange that was made to hold the strongback at one time. * * *

"Q. (By Mr. Larson) Did you observe after the flange was pounded back, did you go down and take a look at it at all?

"A. No, I never went below deck. From where

(Continued)

As was made clear in the testimony, only the top portion of the flange was pounded back flush. The bottom portion was held out in part by bolts. 4/

3/ (Cont'd): we were you can see it quite plainly, and the top portion of it was back in against the coaming."

---Witness Crumby, Tr. p. 80,
emphasis added.

4/ "A. I also went down and stood side by side with the man who had the hammer while he was knocking it back flush to see that it was flush.

THE COURT: What happened to the two bolts to which the flange was attached, welded, or in whatever manner it was affixed? Did they protrude out through the flange or were they knocked down flush, too?

"A. They pursued [sic] it out through the flange, and after the flange was broke loose [i. e., after the accident here involved] the crew members came down with a cold chisel and chiseled those bolts free.

"Q. (By Mr. Larson) How far did the bolts protrude out from the flange after it was flush with the coaming?

"A. I would say a half to three-quarters of an inch. Could be an inch.

"Q. Had similar protrusions existed before the flange had pulled away from the coaming?

"A. What's that again?

"Q. Was the bolt protrusion then about the same distance as it had been before the flange pulled away?

"A. That's correct. * * *

THE COURT: How in the world did it go back flush then unless you drove the pin to which it was attached right into the tank?

"A. They only drove the top part back flush.
The rest of it stood.

(Continued)

After the flange was pounded back, the loading proceeded.

The rigging gear and wires continued to strike against and drag over the flange and coaming--because of the narrow hatch area and the continued use of the same loading method. 5/

Finally, after about five or six more loads, the top portion of the flange was broken off by a descending load and fell and injured Appellee. 6/

4/ (Cont'd): THE COURT: Oh, I see. The whole flange wasn't flush.

"A. No, sir, just the top half, or the top third."

---Witness Hansen, Tr. p. 60, line 6 to p. 61, line 1, and p. 62, line 18 to p. 63, line 1, emphasis added.

5/ "Q. Did any of the loads, apart from hanging up did any of the pallets themselves strike the coaming or the flange after you resumed work [following the pounding of part of the flange flush against the coaming] and before the accident?

"A. Well, working in that small hatch it just about hits some part of the coaming or some part of the tank going down, getting into that small opening just about each and every load will swing a little one way or the other.

"Q. And therefore bang up against the coaming?

"A. These were package loads and we lost very few bricks. We did drop a few bricks, but very few."

---Witness Hansen, Tr. pp. 67-68.

6/ "Q. Then how many pallet loads were dropped into the hold after the pounding had been completed and before the accident in question?

"A. I would say we worked about thirty minutes or five or six loads * * *

THE COURT: Did you see the flange spring loose?

(Continued)

The trial court found in Finding No. 3 (R. 49) that the flange "at the time of the accident was protruding into the working area which was narrow and confined", and in Finding No. 4 (R. 49), "That by reason of said flange protruding into said working area, the SS San Luciano was in an unseaworthy condition."

Appellant attacks these Findings as unsupported by the evidence and inconsistent with certain Supplemental Findings between Appellant and the longshoreman company unloading the vessel, CRESCENT WHARF & WAREHOUSE COMPANY (hereinafter called CRESCENT).

6/ (Cont'd): "A. I was standing side by side with the man. I didn't see the flange in the air, it happened so quick, but the man told me he was struck in the head and his hat was laying on the deck and I saw blood coming from his scalp.

"Q. (By Mr. Larson) Were you able to tell that the load had hung up just prior to the time?

"A. Oh, that's correct, but it was too late then."

---Witness Hansen, Tr. pp. 65-66.

ARGUMENT

I

THE FINDINGS THAT THE FLANGE PROTRUDED INTO THE WORKING AREA AND CAUSED UNSEAWORTHINESS WERE AMPLY SUPPORTED BY THE EVIDENCE.

Appellant contends that Finding No. 3 that the flange "at the time of the accident was protruding into the working area which was narrow and confined" and Finding No. 4 that by reason thereof the vessel "was in an unseaworthy condition" are "clearly erroneous" because unsupported by the evidence and because claimedly in conflict with Supplemental Finding No. 8 (R. 54) 7/ that after the pounding and before the accident "the flange was then against the coaming and in the identical position it had been in at the commencement of [the] loading operation." Appellant urges the finding in Supplemental Finding No. 8 that the flange before the accident "was then flush against the coaming" means it was not "protruding into the working area" and that the Findings are thus in conflict.

Actually the two Findings are in no conflict and Findings No. 3 and No. 4 that the flange at all times protruded into the hatch area and by the danger caused thereby rendered the vessel

7/ The Findings (R. 48) were made in the basic action between Appellee-Plaintiff and Appellant (shipowner). The Supplemental Findings (R. 52) were not subsequent or amendatory but were made concurrently in the indemnification cross-action between the Appellant (shipowner) and CRESCENT, the stevedore company.

unseaworthy are fully supported by the evidence as martrialled above in detail in the Statement of the Case.

Appellant stresses that Supplemental Finding No. 8 finds the flange at the time of the accident "was then flush against the coaming" and in the "identical position it had been in at the commencement of said loading operations." It urges being "flush against the coaming" negates any "protrusion". The true conclusion is quite the contrary; being "flush against the coaming" still leaves the flange protruding to the hatch area by its own width or thickness since it was fastened to the hatch coaming, not embedded therein.

There is no evidence the flange was inlaid; by all of the evidence it was "flush against", not set into, the coaming--precisely as Supplemental Finding No. 8 itself squarely states and as was testified by all of the witnesses. So stated Appellee as a witness ("level or flush with the coaming", Tr. p. 33); so stated the witness Hansen ("flush against the coaming" and "no space between the flange and the coaming", Tr. p. 52); and so stated the witness Crumby ("against the coaming", Tr. p. 80).

Moreover, even after the crew had pounded back the upper lip of the flange after three loads had "hung up" thereon, the bottom portion of the flange protruded particularly into the hatch area because held partly out by certain bolts. Witness:

"A. I also went down and stood side by side with the man who had the hammer while he was knocking it back flush to see that it was flush. * * *

"Q. (By Mr. Larson) How far did the bolts protrude out from the flange after it was flush with the coaming?

"A. I would say a half to three-quarters of an inch. Could be an inch. * * *

"THE COURT: How in the world did it go back flush then unless you drove the pin to which it was attached right into the tank?

"A. They only drove the top part back flush. The rest of it stood.

"THE COURT: Oh, I see. The whole flange wasn't flush.

"A. No, sir, just the top half, or the top third."

---Witness Hansen, p. 60, lines 6-20, and p. 62, line 18 to p. 63, line 1.

The short of it is that precisely because of its location, fastened against the coaming and thereby protruding by its own dimensions into the narrow hatch working area, the flange was continuously vulnerable to being struck or dragged against by the gear and rigging lowering the pallets, creating an inherent unseaworthy danger which was aggravated by the loading method necessary to lower the pallets into the deep tank hatch.

"A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it

over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley which comes out three feet.

"Q. But that was the effect of slackening off on the midship fall?

"A. That is the way we rigged our gear all the time for that tank."

---Witness Hansen, pp. 57-58,
emphasis added.

Thus the findings are in no true conflict, and Findings No. 3 and No. 4 that the flange which caused the accident protruded into the hatch work area at the time of the accident and by doing so created unseaworthy danger were amply supported by the evidence. It was without dispute, and conceded, that the two flanges were unnecessary and useless to the vessel and were to secure strongbacks long previously abandoned in use (Tr. p. 53, lines 1-4; p. 80, lines 8-9; p. 28, line 3; p. 3, lines 8-12), and by their very location on the side of the hatch coaming in the narrow hatch loading opening, they constituted a continuing unseaworthy and unnecessary loading danger and hazard.

Additionally, as to the claim of conflict in the findings, Supplemental Finding No. 8 (relied upon by Appellant) finds that the accident happened when "the loading gear struck or caught said flange causing a part of it to break off and fall and strike plaintiff." (R. 54.) This confirms, not conflicts with, the declaration in Finding No. 3 that the flange was "protruding" into the hatch opening at the time of the accident. To be "struck or caught" by the loading gear implies some degree of protrusion to cause the striking or catching.

In fine, the findings in whole are in no conflict and clearly establish unseaworthiness. It is elementary that findings are to be liberally construed to support a judgment and are to be reconciled and harmonized in their reading by all reasonable efforts of construction. (3 Am. Jur. 462-463; 53 Am. Jur. 795, 798.)

Moreover, as seen in detail in The Statement Of The Case and as reviewed above, the findings are clearly and amply supported by the evidence. Upon appeal findings will not be set aside as unsupported by the evidence unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (United States v. United States Gypsum Co., 333 U.S. 364, 395.) This is the test under the "clearly erroneous" requirement of Rule 52(a), Federal Rules of Civil Procedure, and it applies as well in admiralty as in all other federal proceedings. (Guzman v. Pichirillo, 369 U.S. 698, 702.)

At bar the two flanges, useless in function and located on the coaming of the narrow tween decks hatch, were by their location at all times and continuously in risk of being struck, dragged over or caught against by the gear and rigging lowering the pallet loads. The danger thereby created was a continuing and constant condition of unseaworthiness. It existed when the loading first commenced--witness the three "hung up" loads. It continued to exist thereafter after the flange was pounded back against the coaming again--witness the accident to Appellee which followed. The danger was continuous and arose from the hazardous location of the useless flanges, and under the evidence the finding of unseaworthiness was virtually compelled.

Indeed, unseaworthiness in the premises of the accident was largely if not totally conceded by Appellant to the trial court and counsel below. At the outset of the trial, Mr. Lawrence J. Larson, Esq., representing Appellant, exchanged comments with Court and counsel as follows:

"THE COURT: I think in the Noriega case it was agreed, was it not, that the plaintiff would go ahead and put on his testimony as to damages, whereupon the burden shifts to you, Mr. Larson.

"MR. LARSON: Yes, your Honor. * * *

"MR. BROWN: And, Mr. Larson, it is agreed that plaintiff need not prove negligence or unseaworthiness as against the vessel, this is admitted:

"MR. LARSON: Your Honor, I don't have the

authority to admit it. As I understood it, I will have to put the plaintiff on the stand, I will have to prove the nature of the injury. I don't take dispute with the Court's view in the statements that have been made as to whether the vessel was or was not unseaworthy, but I will have to establish the nature of the accident, the manner in which it happened, as part of our claim of contributory negligence, and it is my understanding that that is where we stood at this point.

"THE COURT: I thought when we were discussing it the other day that you were conceding the fact of established liability as against you subject to your being able to establish that the plaintiff was contributorily at fault.

"MR. LARSON: I was conceding the facts, your Honor, that this flange was not of any function or use at this point in view of the point that the vessel had been altered and that it was the flange which broke off in the course of the cargo loading and struck the plaintiff.

"THE COURT: Well, I think that establishes a *prima facie* case." 8/

---Tr. pp. 2-3.

Thus Appellant to Court and counsel conceded that the flange "was not of any function or use" and that it "broke off in

8/ This statement by the Court was never challenged by Appellant.



the course of the cargo loading." Appellant's counsel further stated he did not "take dispute . . . as to whether the vessel was or was not unseaworthy" and that he would inquire into "the nature of the accident" only "as part of our claim of contributory negligence." If this technically stops short of conceding unseaworthiness, it hardly does so in substance. In any event, whether or not conceded, the unseaworthiness of the improperly and dangerously located useless flange, protruding at all times by its own dimensions into the narrow hatch working area, was demonstrated without contest or dispute by all of the evidence, and the findings predicated thereon are clearly sustainable upon appeal.

II.

THERE IS NO ISSUE OF "INSTANT UNSEAWORTHINESS" AT BAR; THE DANGEROUS LOCATION OF THE UNNECESSARY FLANGE AND THE CONTINUING HAZARD ARISING FROM SUCH LOCATION AND FROM THE METHOD OF LOADING EMPLOYED, CREATED PLAIN AND CLEAR ANTECEDENT AND CONTINUING UNSEAWORTHINESS.

Appellant attempts to argue (Appellant's Brief, pp. 11-12, 15-23) there was no hazard from the flange at bar except when the upper lip was pulled away from the coaming. After the three loads had "hung up" on the flange and work was stopped and the upper lip pounded back flush with the coaming once again, Appellant would have it that no unseaworthiness existed until the very load that caused the accident, for that was the first load to "hang up" after

the flange was pounded back. From this Appellant would argue the cause for the breaking and falling of the flange when Appellee was injured can only have been negligence of the longshoreman company (CRESCENT) "at the very moment of injury" (Appellant's Brief, p. 14), and negligence at the very moment of accident creates only "instant unseaworthiness" for which no unseaworthiness liability arises. (Appellant's Brief, pp. 16 et seq.)

In arguing nonliability for "instant unseaworthiness" Appellant argues issues having no applicability at bar.

What Appellant overlooks completely is that the danger created by the location of the flange and by the method of loading to the deep tank (which method caused the loading gear and rigging to constantly strike and drag against the coaming and flange) was clearly a continuing, antecedent condition, and in no manner one arising only "at the very moment" of the accident. Appellant's cited cases as to "instant unseaworthiness" are therefore completely inapplicable.

The true authority applicable at bar is that of Crumady v. Joachim Hendrik Fisser, 358 U. S. 423 and Blassingill v. Waterman SS Corp. (C. A. 9, 1964), 336 F. 2d 367.

The location of the flange on the hatch coaming of the narrow tween deck hatch, protruding into the hatch area by its own dimensions and exposed thereby to striking, dragging and catching by the loading gear and rigging, created in se a continuing unseaworthy condition likely to be "brought into play" by loading operations to the deep tank at any time. The danger of the flange

was, therefore, an "unseaworthy condition of the vessel" likely to be "brought into play" by loading or unloading operations at any time akin entirely to the danger of the improper winch safety adjustment in Crumady (358 U.S. at p. 427).

Moreover, the danger of the hazardously-located flange was aggravated by the unsafe method of loading employed by CRESCENT within the rule and principle of Blassingill. To avoid the shaft alley the load was consistently pulled sharply inshore by one rope of the rigging, and this consistently caused the rigging and gear to strike against and drag over the coaming and the flange. The testimony was clear:

"A. As we come in the hold we naturally come in on practically two falls until we get down to the shaft alley, get down into the tween deck, and then we slack it over onto the yard fall only in order to clear the shaft alley, so that it was the yard fall that was hanging all the time.

"Q. So that as you slacked over to the yard fall, that caused the pallet load to swing in the direction of the coaming where the flanges were?

"A. That is the only way you can bring the load in without capsizing the load and hitting the shaft alley which comes out three feet. . . . That is the way we rigged our gear all the time for that tank."

---Witness Hansen, pp. 57-58,
emphasis added.

"Q. (By Mr. Larson) Did you observe whether any of the bridle or any part of the rigging came in contact with the flange on the strongback after it was pounded back but before the accident to Mr. Noriega?

"A. Oh. Well, yes, it's impossible to get a load in. It hangs directly in the center of the opening and the opening is so small, that's the only place you can have your gear rigged, is directly over this flange, and in order to get the load in it has to come in contact with that flange."

---Witness Crumby, p. 81,

emphasis added.

This Court's holding in Blassingill is specific and direct that an "unsafe method" of loading adopted by a stevedoring company can "render [a] vessel 'unseaworthy' ". (Blassingill v. Waterman SS Corp., supra, 336 F.2d 367, 368 and f.n. 1; accord: Morales v. City of Galveston, 370 U.S. 165, 170; Knox v. United States Lines Co. (C. A. 3, 1961), 294 F.2d 354; Ballwanz v. Isthmian Lines, Inc. (C. A. 4, 1963), 319 F.2d 457; Strika v. Netherlands Ministry of Traffic (C. A. 2, 1950), 185 F.2d 555 and Robillard v. A. L. Burbank Co. (U.S.D.C.S.D. N.Y., 1960), 186 F.Supp. 193.) Hence the finding of unseaworthiness at bar is confirmed by the aggravated danger of the flange caused by the method of loading adopted and employed by the stevedoring company. This emphasizes that the unseaworthiness at bar was not "instant unseaworthiness" arising out of isolated negligence "at the very moment of the injury",

but arose from continuous conditions and circumstances of hazard existing antecedent to the accident and erecting constant and continuous danger.

CONCLUSION

WHEREFORE, upon all of the reasons and considerations above stated, the judgment below in favor of Appellee should be affirmed.

Respectfully submitted,

NEWTON R. BROWN and

MARGOLIS & McTERNAN

By: BEN MARGOLIS

Attorneys for Plaintiff and Appellee.

WILLIAM B. MURRISH,

Of Counsel.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ben Margolis

BEN MARGOLIS

